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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HENRY HARPER, ET AL.,

Petitioners,

vs.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF *AMICI CURIAE* FOR DESIGNATED FEDERAL RETIREES IN KANSAS, ARKANSAS, NORTH CAROLINA, MONTANA, SOUTH CAROLINA, NEW YORK, UTAH, ALABAMA AND ARIZONA IN SUPPORT OF PETITIONERS

Of Counsel:

Kenton C. Granger
Raymond L. Dahlbert
NIEWALD, WALDECK
& BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods, Bldg. 40
Suite 550
Overland, Park KS 66225
(913) 451-1717

John C. Frieden
Kevin M. Fowler*
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

* *Counsel of Record for Amici Curiae*

[Additional Counsel Listed on Inside Cover]

PARAGON PRINTING & STATIONERY COMPANY, INC.

Roger M. Theis
9411 Shannon Way Court
Wichita, KS 67206
(316) 634-0418

Carrold E. Ray
HILBURN, CALHOON,
HARPER, PRUNISKI
& CALHOUN, LTD.
8th Flr., Twin City Bank Bldg.
P.O. Box 5551
North Little Rock, AR 72119
(501) 372-0110

G. Eugene Boyce
Donald L. Smith
WOMBLE, CARLYLE,
SANDRIDGE & RICE
P.O. Box 831
Raleigh, NC 27602
(919) 755-2100

Edmund F. Sheehy, Jr.
CANNON & SHEEHY
2031 Eleventh Avenue
P.O. Box 5717
Helena, MT 59604
(406) 442-9930

Brian A. Luscher
Robert A. Jensen
BONN, LUSCHER, PADDEN
& WILKINS, CHTD.
804 North Second Street
Phoenix, AZ 85004
(602) 254-5557

Gene M. Connell, Jr.
Edward T. Kelaher
ELAHER, BASS &
CONNELL, P.A.
P.O. Box 14547
Surfside Beach, SC 29587
(803) 238-5648

Rudolph W. Guiliani
Robert Velez
ANDERSON, KILL, OLICK
& OSHINSKI, P.C.
666 Third Avenue
New York, NY 10017
(212) 840-0700

Michael F. Fitzgerald
PHELAN & COSTELLO P.C.
One Penn Plaza, Suite 4310
New York, NY 10119
(212) 868-3000

Richard W. Jones
Jack C. Helgesen
LYON, HELGESEN,
WATERFALL & JONES
4768 Harrison Boulevard
Ogden, UT 84403
(801) 479-4777

E. Mark Ezell
John W. Sharbrough III
EZELL & SHARBROUGH
150 Government Street
Mobile, AL 36602
(205) 432-1413

J. Doyle Fuller
P.O. Box 23458
Montgomery, AL 36123
(205) 270-0020

QUESTION PRESENTED

Whether this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

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BRIEF *AMICI CURIAE* FOR DESIGNATED FEDERAL RETIREES IN KANSAS, ARKANSAS, NORTH CAROLINA, MONTANA, SOUTH CAROLINA, NEW YORK, UTAH, ALABAMA AND ARIZONA IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are the petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992); the respondents in *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *pet. for cert. pending*, No. 91-375; the petitioners in *Swanson v. State*, 407 S.E.2d 791 (N.C.), *adhered to on reh'g*, 410 S.E.2d 490 (N.C. 1991), *pet. for cert. pending*, No. 91-1436; the petitioners in *Sheehy v. Montana*, 820 P.2d 1257 (Mont. 1991), *pet. for cert. pending*, No. 91-1473; the petitioners in *Bass v. South Carolina*, 414 S.E.2d 110 (S.C. 1991), *pet. for cert. pending*, No. 91-1697; the appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543

(N.Y. Sup. Ct. 1990), *aff'd as modified*, 579 N.Y.S.2d (N.Y. App. Div. 1992), *appeal dism'd*, (N.Y., Order, July 7, 1992); the cross-appellants in *Brumley v. Utah State Tax Commission*, No. 91-0242 (Utah, argued Apr. 7, 1992); the cross-appellees in *Sizemore v. Rinehart*, No. 2900290 (Ala. App. 1992), *pet. for cert. pending*, (Ala., No. 1911015); and the appellants in *Bohn v. Waddell*, 790 P.2d 772 (Ariz. T.C. 1990), *aff'd on reconsideration*, 807 P.2d 1 (Ariz. T.C. 1991), *appeal pending* No. 1 CA-TX 90-029 (Ariz. App., argued Feb. 12, 1991).[1]

Amici are retired federal employees (civilian and military) involved in litigation which squarely addresses the question presented here: whether this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), may under any circumstances be given nonretroactive effect to defeat the entitlement of federal retirees to a refund of unconstitutional State taxes imposed on their federal retirement benefits. The ultimate disposition of this issue will have a decided impact on the constitutional rights of *amici* and literally hundreds of thousands of retired federal employees in those States which have refused to enforce the clear mandates of 4 U.S.C. § 111, *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), and *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990). Therefore, *amici* have a salient and compelling interest in proper resolution of the question presented in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The text of the Supremacy Clause, U.S. Const., art. VI, cl. 2, is set forth in Appendix B, *infra*.

2. The pertinent text of 4 U.S.C. § 111 is set forth in Appendix C, *infra*.

[1]Set forth in Appendix A is a complete list of all *amici*. The written consents of the parties to the filing of this brief *amici curiae* have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

The refusal of the Virginia Supreme Court to enforce the plain meaning and effect of 4 U.S.C. § 111, despite its application by this Court to the parties in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), directly conflicts with *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). Furthermore, by suspending the operation of Section 111's prohibition against discrimination until the announcement of *Davis*, its decision offends rudimentary principles of federal supremacy and disregards the solemn judicial obligation to effectuate the clear intent of Congress expressed in an unambiguous statute. The judgment below must be reversed.

In *Davis*, this Court applied 4 U.S.C. § 111 to invalidate a Michigan income tax scheme which favored retired state and local government employees over retired federal employees. 489 U.S. at 817. Enroute to its decision, the Court significantly observed that the "plain" and "unambiguous" terms of 4 U.S.C. § 111 "leave no room for doubt" that the statute protects federal retirees from discriminatory state taxation. 489 U.S. at 808-810 and n.3. In disposing of *Davis*, this Court did not reserve the question of retroactivity; rather, it independently determined that Paul Davis was entitled to a refund of taxes paid in prior years pursuant to Michigan's discriminatory tax scheme. *Id.* at 817.

In *Beam*, every Member of the Court agreed that where the issue of retroactivity is not specifically reserved for subsequent disposition, the rule of law announced in the decision applies to the parties before the Court. *See* 111 S. Ct. at 2451 (O'Connor, J., dissenting opinion, joined by Rehnquist, C.J., and Kennedy, J.). A clear majority of the Court also agreed that when a decision has been retroactively applied to the parties in suit, the decision must be applied retroactively to all other similarly situated litigants. Since *Davis* did not reserve the retroactivity question and clearly applied its decision retroactively to the parties, *Beam* compels that *Davis* must be retroactively applied to all other litigants not barred by procedural limitations or *res judicata*. See *Beam*, 111 S.Ct. at 2448.

Michigan's remedial concession in *Davis* does not affect this conclusion; thus, the opinion below misinterpreted the effect of *Davis* in concluding otherwise.

Although *Beam* alone compels reversal, the Virginia Supreme Court also erroneously applied the analysis described in *Chevron Oil, Inc. v. Huson*, 404 U.S. 97 (1971), to erect a false veneer for its holding that *Davis* was not retroactive. When a judicial decision "d[oes] not overrule clear past precedent nor decide a wholly new issue of impression," it does not satisfy *Chevron's* threshold requirement for nonretroactivity and applies retroactively. *Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202, 3205 (1990) (*per curiam*). Moreover, when a decision like *Davis* has applied settled precedents to construe an unambiguous federal statute in the manner intended by Congress, the rule applies retroactively because it has not altered the law in any material way. *See Hanover Shoe, Inc. v. United States*, 392 U.S. 481, 496-499 (1968). Indeed, *Davis* did not create a new principle of law. To the contrary, *Davis* merely enforced as written the "plain" and "unambiguous" terms of 4 U.S.C. § 111 which "unmistakabl[y]" prohibits discriminatory state taxation of federal retirees. 489 U.S. at 808-810 and n.10. As a decision which straightforwardly applied an unambiguous federal statute, *Davis* merely held that Section 111's express requirements must be enforced as directed by Congress.

The failure to apply *Davis* retroactively would eviscerate the core principles of federal supremacy and separation of powers upon which our constitutional framework is based. Where the language of a congressional enactment is plain, courts have no power to revise a federal statute in accordance with their own notions of considered public policy; instead, courts are required to enforce federal statutes as written. Section 111's unambiguous prohibition against discriminatory state taxation has been the supreme "Law of the Land" since its enactment in 1939 and, by its own force through the Supremacy Clause, has withdrawn all power from the States to enact conflicting legislation. Since an unambiguous Act of Congress must be applied uniformly from its effective date, the Virginia

Supreme Court was not at liberty to defy a clear congressional directive by suspending the national will for over 50 years. Nonretroactive application of *Davis* would suspend Section 111's nondiscrimination clause and would turn federal supremacy on its head, allowing invalid state laws to reign supreme in defiance of the "supreme Law of the Land." The second prong of *Chevron* mandates the retroactivity of *Davis* in order to preserve federal supremacy and to effectuate congressional intent.

Finally, any alleged hardship or inequity which may result from enforcing the unambiguous commands of Congress cannot justify nonretroactive application of *Davis*. The responsibility for the justice and wisdom of legislation rests solely with Congress, while the province of the courts is to enforce, and not make, the laws. In this case, the federal choice of law is, and always has been, the unambiguous terms of 4 U.S.C. § 111. Having exerted judicial power that does not exist to override an unambiguous Act of Congress, the judgment of the Supreme Court of Virginia must be reversed.

ARGUMENT

I. THE OPINION BELOW IRRECONCILABLY CONFLICTS WITH THE DECISION IN *JAMES B. BEAM DISTILLING CO. V. GEORGIA*, 111 S.CT. 2439 (1991)

The controlling rule of decision articulated in *Beam* is that a court commits reversible error whenever it "refuse[s] to apply a rule of federal law retroactively after the case announcing the rule has already done so." 111 S.Ct. at 2446 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.). Despite differences in jurisprudential reasoning between Members of the *Beam* majority, this Court reversed a Georgia Supreme Court judgment which utilized a *Chevron* analysis to conclude that *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), did not apply

to tax refund claims arising before the date of that decision.[2] Accordingly, "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Beam*, 111 S.Ct. at 2448 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.).

In this case, the Virginia Supreme Court concluded on remand that *Beam* does not mandate retroactive application of the decision in *Davis*. Stating that *Davis* did not consider the issue nor rule that its holding applied retroactively to the parties, the opinion below perceived no precedential impediment to the use of *Chevron* analysis in determining whether *Davis* is retroactive. (Pet. 4a). The Virginia court reiterated adherence to its view of the analysis described in *Chevron* and reaffirmed its original decision. (Pet. 4a-5a). Because the lower court's analysis significantly misapprehends the central importance of *Beam* in resolving the proper application of *Davis* and similar decisions of this Court, the judgment below must be reversed.

Without doubt, the majority opinion in *Davis* neither mentioned "retroactivity" nor expressly addressed it as a separate issue for decision. *See* 489 U.S. at 803-817. Judicial silence of this ilk, however, does not support the Virginia court's naked assertion that retroactive application of *Davis* is an unsettled question which may be decided afresh in pending state court litigation. To the contrary, since "retroactivity * * * goes without the saying" in most

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[2]Three members of the Court reached this conclusion as a federal choice of law matter (*see Beam*, 111 S.Ct. at 2446-2448 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.); *and id.* at 2448-2449 (White, J., concurring in judgment)), while three members of the Court concurred in the reversal on broader grounds involving basic norms of constitutional adjudication and limitations on the judicial power (*see id.* at 2449-2450 (Blackmun, J., concurring in judgment, joined by Marshall and Scalia, J.J.); *and id.* at 2450-2451 (Scalia, J., concurring in judgment, joined by Marshall and Blackmun, J.J.)). While the decision in *Beam* was delivered without a majority opinion, it is beyond peradventure that the holding expressed in Justice Souter's plurality opinion articulates the minimally acceptable rule of law which must be applied by lower courts.

decisions of this Court, silence on the issue signifies that the rule announced in a decision has been retroactively applied to the parties before the Court. *Beam*, 111 S.Ct. at 2445 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.). As Justice O'Connor cogently explained:

> **Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.**

Id. at 2451 (dissenting opinion, joined by Rehnquist, C.J., and Kennedy, J.) (emphasis added). Therefore, when a decision of this Court does not "reserve the question whether its holding should be applied to the parties before it, [the decision] is properly understood to have followed the normal rule of retroactive application in civil cases." *Id.* at 2445 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.) (citation omitted).[3]

Because "[t]he *Bacchus* opinion is silent on the retroactivity question," there was no disagreement among Members of this Court that "*Bacchus* applied its rule retroactively to the parties before it."

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[3]For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), this Court established a uniform period of limitations for all 10b-5 actions under the Securities and Exchange Act of 1934. Although *Lampf* announced a new rule and overturned established circuit court precedent, that decision was retroactively applied to the parties in suit without any discussion of the retroactivity question. *See Id.* at 2787-2788 (O'Connor, J., dissenting opinion, joined by Kennedy, J.).

On the other hand, when this Court chooses to reserve judgment on the retroactive or prospective application of a rule-changing decision, it has had no difficulty expressing that determination in the rule changing-decision itself. *See, e.g., American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266, 297-298 (1987) (after deciding the constitutional question presented, the Court remanded the case to Pennsylvania state court "to consider whether our ruling should be applied retroactively"); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964)("We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today.").

Beam, 111 S.Ct. at 2451 (O'Connor, J., dissenting opinion, joined by Rehnquist, C.J., and Kennedy, J.). While the Virginia Supreme Court acknowledged that "*Bacchus* applied its rule retroactively to the litigants in that case," the opinion below attempts to avoid the effect of *Beam* on the basis that "the Court made no such ruling in *Davis*." (Pet. 4a). Since *Bacchus* and *Davis* are both silent on the retroactivity question, the Virginia Supreme Court improperly equated the absence of an express ruling on this issue in *Davis* with parochial freedom to independently determine whether the decision should be given retroactive effect.

In *Bacchus*, this Court did not expressly state that its holding would apply retroactively to the taxpayers or the State of Hawaii, and it did not reserve judgment on the issue. *See Bacchus*, 468 U.S. at 276-277. Instead, the case was reversed and remanded to state court solely for consideration of Hawaii's asserted "pass-through defense" to the taxpayers' refund claims. *Beam*, 111 S.Ct. at 2445 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.); *see also Bacchus*, 468 U.S. at 276-277. By logical and necessary implication, such judicial action retroactively applied the holding in *Bacchus* to the parties before the Court without any express consideration or determination of the retroactivity question. *Beam*, 111 S.Ct. at 2445-2446 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.); *id.* at 2448 (White, J., concurring in judgment); *id.* at 2451 (O'Connor, J., dissenting opinion, joined by Rehnquist, C.J., and Kennedy, J.). Therefore, unless the issue has been specifically reserved by this Court for subsequent disposition, the absence of an express ruling on the retroactivity question does not mean that the application of a civil decision is unsettled; instead, it means that the decision will be retroactively applied to the parties in accordance with customary practice.[4]

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[4]For example, in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), this Court applied the plain language of 4 U.S.C. § 111 to invalidate a discriminatory Kansas income tax which favored state and local government retirees over federal military retirees. *Id.* at 1621-1622, 1626. Although the *Barker* decision was announced with a keen awareness of the retroactivity issue (*see* Tr. Oral Argument at 8-10, 38-41, *Barker*

Like the taxpayers in *Bacchus*, Paul Davis challenged the validity of a discriminatory state tax on constitutional grounds, and simultaneously requested retroactive and prospective relief from unlawful taxation. *Davis*, 489 U.S. at 806-807, 817. Mr. Davis also prevailed on the merits of his challenge. *Id.* at 817. However, this Court expressly decided in *Davis* that "to the extent appellant has paid taxes pursuant to this invalid scheme, he is entitled to a refund. *See Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247 (1931)." 489 U.S. at 817. Since *Davis* unequivocally approved the taxpayer's entitlement to a refund of state taxes paid in prior years, its ruling was retroactively applied to the parties before it with even greater clarity than the *Bacchus* decision, which by contrast, "did not grant outright" the taxpayers' request for a refund. *Beam*, 111 S.Ct. at 2445 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.).[5]

The opinion below erroneously concluded that "the issue of retroactivity was not considered * * * in *Davis* because Michigan previously had agreed to the payment of a refund * * * if its taxing scheme were invalidated." (Pet. 4a). The Virginia Supreme Court ignored the fact that Michigan agreed to pay a refund as the appropriate choice of remedy, but only upon the express condition that this Court invalidated the Michigan tax.[6] The Court in *Davis*

(No. 91-611), and nine States urged the Court to specifically reserve this question to avoid its retroactive effect (Brief of Arizona, Arkansas, Georgia, Iowa, Montana, Oklahoma, Utah, Virginia and Wisconsin as *Amicus Curiae* in Support of Respondents at 1-4, *Barker* (No. 91-611)), like *Bacchus* and *Davis*, the *Barker* opinion is silent regarding the scope of its application. Therefore, the *Barker* decision is properly understood to follow the general rule and it has been retroactively applied to the parties before the Court.

[5]On remand from this Court, the Michigan Court of Appeals properly interpreted the *Davis* opinion as "directing that plaintiff receive refund for overpayment of taxes resulting from this disparate treatment." *Davis v. Department of Treasury*, 446 N.W.2d 531 (Mich. App. 1991).

[6]In *Davis*, Michigan relied upon *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), to argue that *if* the Court invalidated Michigan's discriminatory tax scheme, the inequality could be remedied by either striking the

reached and approved Michigan's concession that Mr. Davis should receive a tax refund (489 U.S. at 817), but only after concluding that Michigan's tax scheme was invalid and only after applying its ruling retroactively to the parties. Under federal law, if the effect of *Davis* was not retroactive, the question of remedy would never have been reached and Mr. Davis could not have been awarded a tax refund. *See American Trucking Ass'ns., Inc. v. Smith*, 110 S.Ct. 2323, 2330 (1990) (O'Connor, J., plurality opinion); *United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2888 (1991). In light of *Beam*, and retroactive application of *Bacchus* without any discussion of the issue, the Virginia court's assertion that the retroactive effect of *Davis* has no precedential value or effect is patently unsupportable.[7]

While judicial silence alone means that a decision has been retroactively applied, Justice Souter also observed that any qualified or unqualified approval of a taxpayer's entitlement to a refund "necessarily implies that the precedential question has been settled

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exemption which favored state retirees or by extending the exemption to federal retirees. Appellees' Brief at 62-63, *Davis* (No. 87-1020). With respect to prospective remedies, Michigan argued that the Court should remand the case and allow the state courts or legislature an opportunity to make this choice between "remedial alternatives." *Id.* at 63. With respect to retroactive remedies, Michigan argued that providing Mr. Davis a tax refund would satisfy the mandate of equal treatment; therefore, the Court should not retroactively strike the exemptions favoring state retirees, which would have imposed a tax on them. *Id.* at 61-63 and 82-83. Michigan's arguments clearly focused only on the choice between "remedial alternatives" and did not even remotely suggest that Michigan's refund concession had any effect upon the Court's independent decision to retroactively apply its holding to the parties before it.

[7]Michigan's concession that a refund was appropriate does not dilute or undermine the binding effect of this Court's determination that Mr. Davis is "entitled to a refund" under *Iowa-Des Moines Bank*. *Davis*, 489 U.S. at 817. "[S]ince the court cannot be controlled by agreement of counsel on a subsidiary question of law," *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917) (Brandeis, J., majority opinion), the *Davis* decision independently determined the taxpayer's entitlement to a refund by approving the validity of Michigan's position. *Cf. Estate of Sanford v. Comm'r of Internal Revenue*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

to the effect that the rule of law will apply to the parties before the Court." *Beam*, 111 S.Ct. at 2445 (plurality opinion announcing the judgment, joined by Stevens, J.). Because the refund issue was resolved by this Court in *Davis*, that case was remanded to state court solely for payment of the taxpayer's refund and consideration of appropriate prospective relief "to comply with the mandate of equal treatment." *Davis*, 489 U.S. at 816-817. These circumstances convincingly demonstrate that the decision "should be read as having retroactively applied the rule there decided." *Beam*, 111 S.Ct. at 2445-2446 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.)(citing *Davis* as comparative support for this proposition in the retroactive application of *Bacchus*).

Since the taxpayer clearly received the benefit of this Court's decision in *Davis*, the opinion below is nothing less than a transparent attempt to exhume and resuscitate the corpse of selective prospectivity despite its burial in *Beam* and its binding effect on state courts.[8] However, it is now settled that "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application." *Beam*, 111 S.Ct. at 2447-2448 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.). Because the Commonwealth of Virginia is no exception, the judgment below must be reversed.

II. THE OPINION BELOW ERRED BY RELYING ON *CHEVRON* ANALYSIS TO SUSPEND THE NONDISCRIMINATION CLAUSE OF 4 U.S.C. § 111 FOR A PERIOD OF FIFTY YEARS

In *Davis*, this Court applied the nondiscrimination clause of 4 U.S.C. § 111 to invalidate a Michigan income tax scheme which

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[8]In the interest of national uniformity and "to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions." *American Trucking Ass'ns., Inc. v. Smith*, 110 S.Ct. at 2330 (O'Connor, J., plurality opinion announcing the judgment, joined by Rehnquist, C.J., and White and Kennedy, J.J.).

favored "retired state and local government employees over retired federal employees." 489 U.S. at 817. *See also Barker*, 112 S.Ct. at 1622 ("*Davis* * * * * invalidated under § 111 the Michigan income tax on federal civil service retirees"). That decision also approved Mr. Davis' entitlement to a refund of taxes paid in prior years. *See Davis* 489 U.S. at 817-818. This Court reversed and remanded the case for payment of Mr. Davis' tax refund and prospective compliance "with the mandate of equal treatment." *Id.*

Despite the rejection of selective prospectivity in ***Beam***, the Virginia Supreme Court reaffirmed its adherence to a three-step *Chevron* analysis in determining that "the *Davis* decision is not to be applied retroactively." (Pet. 17a). While straightforward application of *Beam* alone warrants reversal of the judgment below, the Virginia Supreme Court further erred by utilizing *Chevron* analysis to effectively suspend the nondiscrimination clause of 4 U.S.C. § 111 from its enactment in 1939 until the announcement of *Davis* fifty years later. Because Section 111 is an "unambiguous statute" which clearly expresses the intent of Congress in "plain language" with "unmistakable" meaning (*see Davis*, 489 U.S. at 808-810 and n.3), the opinion below improperly refused to enforce its prohibition against discrimination any time before March 28, 1989.

A. The Application of 4 U.S.C. § 111 in *Davis* Did Not Establish a New Principle of Law

Before any judicial decision may be even considered for nonretroactive application, it "'must establish a new principle of law by overruling clear past precedent * * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed.'" *American Trucking Ass'ns., Inc. v. Smith*, 110 S.Ct. at 2331 (O'Connor, J., plurality opinion) (quoting *Chevron*, 404 U.S. at 106). However, when a decision "d[oes] not overrule clear past precedent nor decide a wholly new issue of first impression," it does not satisfy this threshold requirement and "thus applies retroactively." *Ashland Oil*, 110 S.Ct. at 3205.

The *Davis* decision did not overrule any clear past precedent in invalidating Michigan's income tax on federal retirees. *See* 489 U.S. at 803-818. To the contrary, *Davis* struck down the discriminatory tax by merely enforcing the plain terms of 4 U.S.C. § 111. *Id.* at 812-814, 817; *see also Barker*, 112 S.Ct. at 1622. Without even passing reference to Section 111, however, the opinion below concluded that *Davis* "established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed." (Pet. 12a). Since *Davis* was decided by applying the "plain" and "unambiguous" language of Section 111 (*see* 489 U.S. at 808-810; *Barker*, 112 S.Ct. at 1622), the Virginia Supreme Court clearly misapprehended the statutory basis for that decision and the necessity of retroactive application.

Generally speaking, "when a decision of this Court merely has applied settled precedents to new and different factual situations," the rule applies retroactively because it has not altered the law "in any material way." *United States v. Johnson*, 457 U.S. 537, 549 (1982). In such cases, "retroactivity * * * goes without the saying." *Beam*, 111 S.Ct. at 2445 (Souter, J., plurality opinion announcing the judgment, joined by Stevens, J.). Similarly, a constitutional decision which merely extends a legal doctrine without overturning established precedent or announcing a "revolutionary" rule "does not meet the first prong of the *Chevron Oil* test." *Ashland Oil*, 110 S.Ct. at 3205.[9] The same is true with respect to decisions which interpret and apply federal statutes. As Justice White explained for the majority in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), a decision which applies a federal statute based on "existing authorities" without "adopting a radically new interpretation" will be given

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[9] In *Ashland Oil*, a unanimous Court held that *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), applied retroactively in determining the constitutionality of a West Virginia gross receipts tax for the fiscal years ending September 1975 and 1976. 110 S.Ct. at 3203-3205. While *Armco* contributed to the development of dormant Commerce Clause jurisprudence by adopting the internal consistency test, the decision did not satisfy the threshold requirement for nonretroactive application because it neither overruled established precedent nor decided a wholly new issue of first impression. *Id.* at 3205.

retroactive effect unless it marks "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Id.* at 497-498.[10]

Because "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward," only the most exceptional circumstances can ever "warrant withholding retroactive application of a decision construing a statute as Congress intended it." *United States v. Estate of Donnelly*, 397 U.S. 286, 294-295 (1970). In rare instances, this Court has reserved judgment on the issue when overruling its own construction of a statute (*see Simpson v. Union Oil Co.*, 377 U.S.

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[10]In *Hanover Shoe*, this Court held that *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), would be retroactively applied in determining a plaintiff's entitlement to damages under the Sherman Act. The Court of Appeals had concluded that *American Tobacco* would not be given retroactive effect and that Hanover could not recover damages prior to its announcement on June 10, 1946 reasoning that *American Tobacco* "fundamentally altered the law of monopolization" by eliminating proof of predatory practices in addition to monopoly power. *Hanover Shoe*, 392 U.S. at 495. This Court reversed, reasoning in relevant part:

> In the *American Tobacco* case, this Court noted that the precise question before it had not been previously decided * * * and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals [in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. (1945)], this Court relied for its conclusion upon existing authorities. These cases make it clear that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist. In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks.

Hanover Shoe, 392 U.S. at 496-499 (White, J., majority opinion) (citation omitted).

at 24-25), or denied retroactive effect to a decision which resolved complex questions of first impression involving the application of an ambiguous statute in light of conflicting legislative history (see *Allen v. State Board of Elections*, 393 U.S. 544, 570-571 (1969)). However, no exceptional circumstances are present here that can justify suspending application of the plain language of the nondiscrimination clause of 4 U.S.C. § 111 until the announcement of *Davis* on March 28, 1989.[11]

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[11]In *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) and *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), this Court held that Title VII prohibited employers from requiring women to make larger contributions in order to obtain the same deferred compensation and pension plan benefits as men. Neither case was given retroactive effect.

Recognizing that Title VII was not "intended to revolutionize the insurance and pension industries" and the statute "does not require * * * any retroactive relief," the Court in *Manhart* concluded that changes in the legal rules governing pension and insurance funds "should not be applied retroactively unless the legislature has plainly commanded that result." 435 U.S. at 717-718, 721. However, the Congress and EEOC have recognized the "importance of making only gradual and prospective changes in the rules that govern pension plans." *Id.* at 721-722 and n.40. Given the potentially devastating effect of retroactive liability on the insurance industry and pension plans, where the harm would be largely felt by innocent third parties, it would be inequitable to impose such relief based on the "unforeseen" contingency of a Title VII decision "which represents a marked departure from past practice." *Manhart*, 435 U.S. at 721-723.

In *Norris*, five Members of this Court concluded that its decision should be given only prospective effect. Relying upon the intent of Congress expressed in the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) and Title VII's legislative history, four Members of the Court dissented from the application of *Manhart* to voluntary deferred compensation plans and reasoned, based on *Manhart* itself, that an award of retroactive relief "would be both unprecedented and manifestly unjust." 463 U.S. at 1099-1105 (Powell, J., dissenting in part and concurring in part, joined by Burger, C. J., and Blackmun and Rehnquist, J.J.). Justice O'Connor provided the pivotal swing vote for nonretroactive application of *Norris*. Reasoning that "the answer" on the merits "is far from self-evident" because "the general language chosen by Congress does not clearly resolve the precise question," Justice O'Connor applied *Chevron* analysis and the Court's equitable powers under Title VII to fashion an appropriate prospective remedy. 463 U.S. at 1107-1111 (concurring opinion).

In view of the unique circumstances present in *Manhart* and *Norris*, both decisions are inapposite to proper resolution of this case.

When Congress originally enacted 4 U.S.C. § 111 as part of the Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575 (effective January 1, 1939), it consented to state taxation of current and retired federal employees "if the taxation does not discriminate against the * * * employee because of the source of the pay or compensation." *See Davis*, 489 U.S. at 808-809. Under settled principles of statutory interpretation, the "plain language" of Section 111 "leaves no room for doubt" that it protects federal retirees from discriminatory state taxation (*Davis*, 489 U.S. at 808-810 and n.3), and "the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity" (*id.* at 813). This principle of nondiscrimination precludes any State from taxing federal retirees if "it treats someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 545 (1983). Section 111 accordingly prohibits the imposition of state taxes which discriminate against federal retirees in favor of state retirees unless "the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383 (1960)). *See also Barker*, 112 S.Ct. at 1622.[12]

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[12]Even the lone dissenter in *Davis* conceded that "[a]rguably, the Court's holding today is merely a logical extension of our decisions in *Phillips Chemical* * * *, and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983)." 489 U.S. at 824 (Stevens, J., dissenting opinion). In light of these and other precedents which have recognized or applied the nondiscrimination principle, this acknowledgment by Justice Stevens demonstrates that *Davis* did not arrive like a bolt from the blue. *See, e.g., Memphis Bank*, 459 U.S. at 397-399 (applying the nondiscrimination clause of 31 U.S.C. § 742 "as principally a restatement of the constitutional rule" to invalidate a Tennessee bank tax which discriminated "in favor of securities issued by Tennessee and its political subdivisions and against federal obligations * * * * by including in the tax base income from federal obligations while excluding income from otherwise comparable state and local obligations."); *Phillips Chemical*, 361 U.S. at 383-387 (applying the nondiscrimination principle to invalidate a Texas lease tax which impermissibly imposed a greater tax burden on lessees of federal property than lessees of exempt property owned by the State and its political subdivisions). Thus, the most that can be said about *Davis* is that the Court relied upon (and perhaps logically extended) settled judicial precedent in applying the nondiscrimination clause of 4 U.S.C. § 111.

Because Section 111 is an "unambiguous statute" which "leaves no room for doubt" regarding the scope of its intended meaning, application and effect (*see Davis*, 489 U.S. at 809-810, 812-813 and n.3), the duty of the courts "is simply to enforce the law as it is written, unless clearly unconstitutional." *Chung Fook v. White*, 264 U.S. 443, 446 (1924). This solemn obligation of the judiciary to enforce the intent of Congress expressed in unambiguous legislation is beyond dispute. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'") (citation omitted).[13]

Writing for the Court in *Norfolk & Western v. American Train Dispatchers*, 111 S.Ct. 1156 (1991), Justice Kennedy recently explained:

> As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. **'If the intent of Congress is clear, that is the end of the matter; for the court * * * * must give effect to the unambiguously expressed intent of Congress.'**

Id. at 1163 (quoting *Chevron U.S.A. Inc. v. Natural Resources*

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[13]See also *Texas Cement Co. v. McCord*, 233 U.S. 157, 163 (1914) (unanimous opinion) ("it is only the province of the courts to enforce the statute in accordance with its terms."); *St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U.S. 281, 295 (1908) (the courts "have * * * no duty except to enforce the law as it is written"); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 37-38 (1895) ("where the meaning of the legislature was plain 'it must be obeyed.'")(quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 385 (1805)); *Thornley v. United States*, 113 U.S. 310, 313 (1885) ("Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms."); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870) (where the language of a federal statute is clear and unambiguous, "[i]t is the duty of the courts to execute it."); *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) ("It is our duty to expound and execute the law as we find it.").

Defense Council, Inc., 467 U.S. 837, 842-843 (1984) (emphasis added)). *See also Patterson v. Shumate*, 60 U.S.L.W. 4550, 4551 (U.S., June 15, 1992) (No. 91-913) (Blackmun, J., unanimous opinion) (in applying "the plain language" of 11 U.S.C. § 541(c)(2), the Court "must enforce the statute according to its terms."). Therefore, **"when a federal statute unambiguously forbids the States to impose a particular kind of tax * * *, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted."** *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 (1983) (unanimous opinion) (emphasis added) (invalidating a Hawaii tax on airline gross receipts which violated "the plain meaning" of 49 U.S.C. § 1513(a)).[14]

Since the intent of Congress is clearly expressed in the unambiguous language of 4 U.S.C. § 111, application of this longstanding statutory mandate in *Davis* did not create any "new" principle of federal law; rather, it fulfilled this Court's duty to enforce valid congressional legislation which is and has been the "supreme Law of the Land." *See* U.S. Const. art. VI, cl. 2. While the nondiscrimination clause of Section 111 is binding on "the Judges in every State" (U.S. Const., art. VI, cl. 2), the Virginia Supreme Court has persistently refused to enforce it. *Contra McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) (Marshall, C.J., unanimous opinion) ("This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."). Both opinions of the Virginia court have indefensibly ignored federal supremacy under the rubric of *Chevron* by suspending enforcement

[14] "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 111 S.Ct. 599, 604 (1991) (Rehnquist, C.J., unanimous opinion). These rare and exceptional cases, however, exist only where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *accord Demarest*, 111 S.Ct. at 604. Given the clarity of 4 U.S.C. § 111, however, this exception has no application here.

of the nondiscrimination clause of Section 111 in Virginia any time before 1989. *Contra McCullough*, 17 U.S. (4 Wheat.) at 436 ("the States have no power * * * to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress * * * * This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."). Regardless of the bounds or propriety of "pure" prospectivity, however, this doctrine cannot ever be applied to any judicial decision which enforces the plain language and intent of an unambiguous federal statute unless a court is willing to disregard the Supremacy Clause, the intent of Congress and the limitations on judicial power applicable in cases arising under the laws of the United States.

Under our constitutional system of government, the supreme lawmaking power is vested in Congress as the national legislature. *See* U.S. Const., art. I, § 1; *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587-588 (1952). *See also The Federalist No. 44*, at 356 (J. Madison) (J. Hamilton ed. 1869); *The Federalist No. 33*, at 255 (A. Hamilton) (J. Hamilton ed. 1869). Because it is undisputed that 4 U.S.C. § 111 is a valid exercise of legislative authority, no court can lawfully refuse to apply the "unmistakable" meaning of its "unambiguous" prohibition against discrimination. *See Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) (*per curiam*) ("the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress."). From its effective date in 1939, Section 111 has operated through the Supremacy Clause to withdraw all power from the States to enact conflicting legislation.

In the authoritative words of Chief Justice Marshall, "[i]t is the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCullough*, 17 U.S. (4 Wheat.) at 427. Consequently, 4 U.S.C. § 111 has outlawed discriminatory State taxation by its own force without any need for a judicial declaration to that effect.

> Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be.

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224-225 (1845). Since the "plain language" and "unmistakable" meaning of 4 U.S.C. § 111 have been the "supreme Law of the Land" for more than 50 years, *Davis* did not establish a "new" principle of federal law which in effect replaced an older one; instead, this Court simply applied the Supremacy Clause to invalidate a state statute which conflicted with the plain meaning of an unambiguous federal statute.

The Virginia Supreme Court's assertion that *Davis* established a "new" principle of law likewise ignores settled limitations on the judicial power which require enforcement of valid congressional enactments. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) ("Federal courts are bound to apply rules enacted by Congress with respect to matters * * * over which it has legislative power."); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (same); *Lake County v. Rollins*, 130 U.S. 662, 672-673 (1889) (the judicial function is limited to enforcing the laws as enacted). Under our tripartite system of government and the separation of powers doctrine, "[t]his court * * * * * has no legislative powers." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 469 (1866); *see also Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.*, 171 U.S. 55, 66 (1898) ("beyond the terms of the statute courts may not go. They have no power of legislation."); *The Federalist No. 78*, at 576, 579 (A. Hamilton) (J. Hamilton ed. 1869); *The Federalist No. 47*, at 376 (J. Madison) (J. Hamilton ed. 1869). It is equally beyond dispute that courts have no power to revise or veto valid congressional enactments. See *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own

conceptions of prudent public policy."); *TVA v. Hill*, 437 U.S. 153, 194-195 (1978) ("We do not sit as a committee of review, nor are we vested with the power of veto."); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (the President may not share the veto power with the Judiciary).

In cases or controversies within its jurisdiction (U.S. Const., art. III), "[t]he responsibility of this Court * * * is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970). Because the Court has no legislative powers, "[i]t cannot amend or modify any legislative acts" (*License Tax Cases*, 72 U.S. (5 Wall.) at 469), and it has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). *See also New York Nat. Bank v. Massey*, 192 U.S. 138, 146 (1904) ("We are to interpret statutes, not to make them."). Consequently, "[f]or this court to * * * disregard the plain language and the plain intent" of an unambiguous federal statute "would be to enact a new law under the pretense of construing one and thus pronounce itself guilty of a flagrant perversion of the judicial power." *Heiner v. Donnan*, 285 U.S. 312, 331 (1932).

As a statutory case, the central import of *Davis* "is not to make a new law but only to hold that the law always meant what the court now says it means." *Fleming v. Fleming*, 264 U.S. 29, 31-32 (1924) (Taft, C.J., unanimous opinion). Because the nondiscrimination clause of 4 U.S.C. § 111 has operated in all States since 1939, the retroactive application of *Davis* is a constitutional imperative. Inasmuch as Section 111 is an "unambiguous statute" whose "overall meaning * * * is unmistakable" (*Davis*, 489 U.S. at 809-310 and n.3), settled limitations on the judicial power prohibited this Court in *Davis* from nullifying the plain intent of Congress through prospective decisionmaking. Despite the total absence of judicial power to override Section 111, the opinion below has nevertheless suspended the operation of its nondiscrimination clause in Virginia before

March 28, 1989. While "[t]he court has power to construe a legislative act, * * * it has no power by change in construction to date its passage as a law from the time of the later decision." *Fleming*, 264 U.S. at 32; *see also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 217 (1871) ("Legislative enactments, where the language is unambiguous, cannot be changed by construction").[15]

Given these circumstances, it is unthinkable that *Davis* established a new principle of law on the asserted basis that Virginia could not have known "a statutory scheme, exempting state pensioners from state taxation, would have placed any foreseeable and direct burden on some federal operation." (Pet. 12a). Because valid federal statutes "control the constitution and laws of the respective States, and cannot be controlled by them" *(McCullough*, 17 U.S. (4 Wheat.) at 426), the force and effect of 4 U.S.C. § 111 does not turn on the self-serving perceptions of the States. Any such assertion belies federal supremacy as well as the intent of Congress expressed in Section 111 to protect the United States and its retired employees from any discriminatory tax regardless of whether it actually "interfere[s] with the Federal Government's ability to perform its governmental functions." *See Davis*, 489 U.S. at 812-814; *cf. Washington v. United States*, 460 U.S. 536, 546 n. 12 (1983) (Rehnquist, J., majority opinion) ("when Congress has acted in this field, it has applied a nondiscrimination rule" to determine the validity of state taxes). Under Section 111 and the modern tax immunity doctrine, the critical requirement is "that the government tax in a nondiscriminatory fashion." *South Carolina v. Baker*, 485 U.S. 505, 526 n.15 (1988). *See also Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 485-487 (1939); *id.* at 488 (Frankfurter, J., concurring opinion) ("state and federal governments must avoid

[15]Indeed, "a statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.'" *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 827 (1978) (quoting *United States v. Sisson*, 399 U.S. 267, 297 (1970)).

exactions which discriminate against each other . . ."). [16]

Nevertheless, as this Court unequivocally observed in *Davis*, preferential tax exemptions for retired state and local government employees "to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine * * * is intended to bar." 489 U.S. at 815 n.4. Since state tax discrimination against the United States or those with whom its deals invariably causes them to suffer unequal economic burdens (*cf. Washington v. United States*, 460 U.S. at 544), there has never been any departure from the principle that "a state tax may not discriminate against the Government or those with whom it deals." *Phillips Chemical*, 361 U.S. at 387. *See also Davis*, 489 U.S. at 812.

Simply stated, *Davis* did not establish a new principle of law by overruling past precedent or deciding a wholly new issue of first impression; rather, *Davis* applied the plain language and unmistakable meaning of 4 U.S.C. § 111 to enforce the "supreme Law of the Land" as it has existed since 1939. By mischaracterizing the holding in *Davis* as a new principle of law and refusing to give it any retroactive effect, the Virginia Supreme Court unlawfully suspended the nondiscrimination principle of Section 111 for more than 50 years. The opinion below has accordingly overridden an express determination of Congress in violation of the Supremacy Clause by asserting judicial power which does not exist. Because the holding in *Davis* cannot be given nonretroactive effect without offending principles of federalism and federal supremacy through unprecedented judicial usurpation of legislative power, the judgment of the Virginia Supreme Court must be reversed.

[16]"[I]t is the discrimination, not the quality of the burden, that carries unconstitutional consequences." *Washington v. United States*, 460 U.S. at 555 (Blackmun, J., dissenting opinion, joined by White, Marshall and Stevens, JJ.); *cf. Bacchus* , 468 U.S. at 269 ("It is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'") (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981)).

B. Retroactive Application of *Davis* is Necessary to Enforce Federal Supremacy and Limitations on the Judicial Function

Under the plurality's approach in *American Trucking Ass'ns., Inc. v. Smith*, the second factor which must be examined is "'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" 110 S.Ct. at 2331 (O'Connor, J.) (quoting *Chevron*, 404 U.S. at 106-107). Despite its failure to discuss the existence, history, purpose or effect of the nondiscrimination principle applied in *Davis*, the opinion below summarily concluded that "the second prong of the *Chevron* test is satisfied." (Pet. 12a). Although the Virginia General Assembly remedied the "defects in its statute" on a prospective basis following the announcement of *Davis* (*id.*),[17] such limited corrective action does not fully enforce the longstanding prohibition against discrimination, and it does not legitimize or eradicate Virginia's past practice of unlawful taxation.

For more than 50 years, 4 U.S.C. § 111 has fully codified "the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813. This nondiscrimination principle arises from the Supremacy Clause (*South Carolina v. Baker*, 485 U.S. at 518 n.11), and "has, from the time of *McCullough v. Maryland*, barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Davis*, 489 U.S. at 812 (quoting *United States v. City of Detroit*, 355 U.S. 466, 473 (1958)). It is, accordingly, beyond question that a State tax scheme which favor those who deal with the State over those who deal with the Federal Government is unlawful except in the most limited circumstances with no application here. *See Barker*, 112 S.Ct. at

[17] By contrast, certain other States such as Kansas did not voluntarily take any corrective action in response to the *Davis* decision. *See Barker*, 112 S.Ct. at 1622, 1626.

1622; *Davis*, 489 U.S. at 815-817; *Memphis Bank*, 459 U.S. at 397-399.[18]

While the tax immunity doctrine is based on the need to protect federal operations from undue interference by the States, "all precedent" has established a "settled rule" that those who deal with the United States -- including federal retirees -- are entitled to protection from discriminatory taxation. *See Davis*, 489 U.S. at 814-815.[19] It is equally settled that such "a discriminatory tax is void and 'may not be exacted.'" *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961) (quoting *Phillips Chemical*, 361 U.S. at 387). Because the plain language of 4 U.S.C. § 111 has operated by its own force to prohibit State tax discrimination against federal retirees, nonretroactive application of *Davis* would conflict with congressional intent, federal supremacy, limitations on the judicial power and due process of law.[20]

[18] *See also United States v. County of Fresno*, 429 U.S. 452, 462 (1977); *Phillips Chemical*, 361 U.S. at 383-385; *cf. Bacchus*, 468 U.S. at 273 (preferential tax exemptions are discriminatory regardless of motivation); *id.* at 286 (Stevens, J., dissenting opinion, joined by Rehnquist and O'Connor, J.J.) (providing a special benefit in the form of a tax exemption is a kind of discrimination).

[19] As this Court observed in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." 489 U.S. at 815 n.4. To protect the United States from even the possibility of impermissible discrimination, consent to taxation under 4 U.S.C. § 111 has been "expressly confined" to state and local "taxation which does not discriminate against [federal] officers or employees because of the source of their compensation." S.Rep. 112, 76th Cong., 1st Sess. 12 (1939); H.R. Rep. 26, 76th Cong., 1st Sess. 5 (1939).

[20] In a related context, this Court has observed that victims of tax discrimination may not be deprived of their "legal right to recover the amount of the tax unlawfully exacted" through prospective decisionmaking which "leaves the monies thus exacted in the public treasury." *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504-505 (1928). *See also McKesson v. Div. of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238, 2247-2250 (1990). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803).

It is true that the tax immunity doctrine is not intended to prevent "legitimate" taxation (Pet. 12a), however, Virginia's discriminatory tax has never been "legitimate." The opinion below misinterpreted and misapplied the analysis of Justice O'Connor in *American Trucking Ass'ns., Inc. v. Smith* to declare that "Virginia's taxing statute was legitimate until" the announcement in *Davis*. *Id.* In *American Trucking Ass'ns., Inc. v. Smith*, the plurality concluded that an Arkansas tax was "legitimate" before the announcement of *American Truck Ass'ns., Inc. v. Scheiner*, 483 U.S. 266 (1987), because "*Scheiner* established a 'new principle of law' by *overruling* those aspects of the *Aero Mayflower* cases on which the State of Arkansas relied in enacting and assessing the * * * tax." 110 S.Ct. at 2332 (emphasis added). By stark contrast, *Davis* did not overrule any established precedent and *amici* are unaware of a single decision of this Court which furnishes any genuine support for Virginia's decision to unlawfully favor state and local government retirees over federal retirees. Indeed, Virginia's discriminatory tax scheme always conflicted with the plain language of 4 U.S.C. § 111; therefore, it cannot attain legitimacy through judicial fiat. Where the State's "power to tax (federal retirees) is not unlimited, validity is not established by the mere imposition of a tax," (*cf. Mullaney v. Anderson*, 342 U.S. 415, 418 (1952) (Frankfurter, J., majority opinion)), nor is it established by the passage of many years without legal challenge (*Ashland Oil*, 110 S.Ct. at 3205 n*). Since Virginia has never had any power to impose discriminatory taxes against retired federal employees, its offensive tax scheme in effect before *Davis* was void *ab initio* and cannot be legitimized after the fact by a stroke of the judicial pen.

"[A] state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions." *Northern Securities Co. v. United States*, 193 U.S. 197, 347 (1904). *See also McCray v. United States*, 195 U.S. 60 (1904). Because the nondiscrimination clause of 4 U.S.C. § 111 has been in operation since 1939 (*see Pollard's Lessee*, 44 U.S. (3 How.) at 224-225),

this statute imposes an absolute requirement which may not be abrogated, compromised or suspended by the States. *See McKesson*, 110 S.Ct. at 2246 ("state courts must interpret and enforce faithfully the 'supreme Law of the Land'"). As this Court explained in *Trinityfarm Co. v. Grosjean*, 291 U.S. 466 (1934), application of the tax immunity doctrine "does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." *Id.* at 471. *See Washington v. United States*, 460 U.S. at 554 (Blackmun, J., dissenting opinion, joined by White, Marshall and Stevens, J.J.) ("The Supremacy Clause does not merely guarantee equality; it absolutely immunizes [those who deal with] the United States from discriminatory state taxation.").

If this Court sanctions Virginia's impermissible judicial legislation to validate discriminatory taxation against federal retirees from January 1, 1939 to March 28, 1989, the statutory nondiscrimination principle will be emasculated and the Supremacy Clause will become an "empty and unmeaning declamation." *McCullough*, 17 U.S. (4 Wheat.) at 433. "It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Marbury v. Madison*, 5 U.S. (1 Cranch) at 178. Retroactive application of *Davis* is thus necessary to further established principles of federalism and federal supremacy, without which "the world * * * would [see] a monster, in which the head [is] under the direction of the members." *The Federalist No. 44*, at 356 (J. Madison) (J. Hamilton ed. 1869). If States may invoke the nonretroactivity doctrine to avoid the controlling force of an unambiguous federal statute, "the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation." *The Federalist No. 15*, at 143 (A. Hamilton) (J. Hamilton ed. 1869). The judgment below should accordingly be reversed.

C. Any Alleged Hardship or Inequity Which May Result From Enforcing the Nondiscrimination Clause of 4 U.S.C. § 111 Cannot Justify Nonretroactive Application of *Davis*

Under the plurality's approach in *American Trucking Ass'ns., Inc. v. Smith*, the final factor which must be examined is "'the inequity imposed by retroactive application,'" because in some law-changing decisions, "'injustice or hardship [may be avoided] by a holding of nonretroactivity.'" 110 S.Ct. at 2331 (O'Connor, J.) (quoting *Chevron*, 404 U.S. at 107). Despite its failure to acknowledge the existence, operation or effect of 4 U.S.C. § 111, the opinion below concluded that nonretroactive application of *Davis* was required to avoid potentially disruptive financial consequences for Virginia and its citizens. (Pet. 13a-14a). However, the nondiscrimination clause of Section 111 must be enforced regardless of the consequences; equitable considerations are simply irrelevant to the proper application of an unambiguous federal statute.

Even where the plain meaning of a federal statute, if applied, may result in "disastrous" or "harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress and it is the province of the courts to enforce, not to make, the laws." *United States v. First National Bank of Detroit*, 234 U.S. 245, 260 (1914); *accord, St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U.S. at 295 (the "harshness" of unambiguous legislation "is no concern of the courts").[21] "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice."

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[21] *See also Helvering v. New York Trust Co.*, 292 U.S. 455, 464 (1934); *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 277-278 (1929); *Commr. of Immigration of Port of New York v. Gottlieb*, 265 U.S. 310, 313 (1924); *Low Wah Suey v. Backus*, 225 U.S. 460, 476 (1912); *United States v. Fisher*, 6 U.S. (2 Cranch) at 386 (Marshall, C.J.) (if the meaning of a federal statute is plain, "it must be obeyed" even "where great inconvenience will result.").

Youngstown Sheet and Tube, 343 U.S. at 589. Consequently, in cases when the application of an unambiguous federal statute "may result in disruption of state systems of taxation," this Court is "bound by the plain language of the statute." *Aloha Airlines*, 464 U.S. at 14 n.10.

Likewise, "[t]he court cannot add an exception based on equitable grounds when Congress forebore to make such an exception." *Louisville and Nashville Railroad Co. v. Mottley*, 219 U.S. 467, 479 (1911).[22] "To do so, would be to usurp the function of another and a distinct governmental department. It would be legislation, and not adjudication." *Leffingwell v. Warren*, 67 U.S. 599, 605 (1862). As this Court observed in upholding the validity of a state labor statute:

> [I]f it be said that a statute * * * is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. **No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.** '

Atkin v. Kansas, 191 U.S. 207, 223 (1903) (emphasis added). Indeed, "[i]t would be better * * * to look hardship in the face rather than break down the rules of law." *St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U.S. at 295.

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[22] *Accord, Freytag v. C.I.R.*, 111 S.Ct. 2631, 2636 (1991) ("courts 'are not at liberty to create an exception where Congress has declined to do so.'") (quoting *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 309 (1989)); *Corona Co. v. United States*, 263 U.S. 537, 540 (1924) (where "the words of the statute are plain * * * * we are not at liberty to add an exception in order to remove apparent hardship in particular cases.").

In applying its view of the equities under *Chevron* to determine whether *Davis* should be given retroactive effect, the Virginia Supreme Court misperceived its judicial responsibility and usurped the prerogative of Congress by refusing to enforce the plain terms of Section 111. Under our constitutional system of government, equitable considerations do not affect the judicial obligation to apply unambiguous statutes enacted by Congress pursuant to its constitutional powers. Because no court is empowered to suspend the plain meaning of 4 U.S.C. § 111 to avoid perceived hardships or inequitable results, the judgment below must be reversed.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed and remanded for further proceedings to refund, within the applicable limitations period, all income taxes paid by Petitioners pursuant to Virginia's unlawful tax scheme in effect before *Davis*. Such action is necessary to enforce the plain terms of 4 U.S.C. § 111 and to ensure full compliance with the mandate of *McKesson* to provide meaningful backward-looking relief.

Respectfully submitted,

John C. Frieden
Kevin M. Fowler*
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

Counsel of Record for Amici Curiae

APPENDIX A

The following is a complete list of all individuals appearing as *amici curiae* in connection with this brief:

KANSAS *AMICI*

The petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), include:

KEYTON BARKER;
PAULINE BARKER;
ROBERT W. CLAY;
BETTY J. CLAY;
ANTHONY E. COCORAN;
JOHN G. FOWLER;
LELAND W. KEISTER, JR.;
PATRICIA K. KEISTER;
EDWARD F. KELLOGG;
RENATA O. KELLOGG;
WILLIAM J. LOBER, JR.;
MARJORIE E. LOBER;
ROGER J. OLSON;
NANCY W. OLSON;
ANDREW J. PEELE;
WILLIAM RICHARDS, SR;
OLLUN E. RICHARDS;
LEONARD W. WILLIAMS;
LONETA S. WILLIAMS;
CLARENCE WOLF; AND
FLORA B.WOLF,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 14,000 federal military retirees (and joint taxpayer spouses, where applicable) who have been subject to Kansas income taxation.

ARKANSAS *AMICI*

The petitioners in *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *pet. for cert. pending*, No. 91-375, include:

STANLEY BOSNICK;
WILLIAM D. BARLOW;
HANK GAJDA;
DON LANE
WILLA S. LINDSEY;
JOHN SANDFORT; AND
GEORGE E. STEWART,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 33,000 federal military and civilian retirees who have been subject to Arkansas income taxation.

NORTH CAROLINA *AMICI*

The petitioners in *Swanson v. State*, 407 S.E.2d 791 (N.C.), *adhered to on reh'g*, 410 S.E.2d 490 (N.C. 1991), *pet. for cert. pending*, No. 91-1436, include:

NORMAN W. SWANSON
HENRY F. MURRAY
CARL L. WHITNEY
WILLIAM E. NICHOLSON, III
CHARLES A. DANCY
MELVIN F. EYERMAN
IRA N. SCHWARZ
JOHN L. POWELL, JR.
GALINA ELWORTH
DONALD V. WALLACE
WILLIAM E. DENTON
ROBERT A. NISBET,
WALTER J. BARTNIKOWSKI
RALPH P. HUNT,
MARION B. ZOLLICOFFER
WILLIAM H. TALBERT
BILLY CLARK
WALLACE M. DAVIS
GRADY L. STRANGE
HAMILTON M. HOWE
MARY L. PRITCHARD
ROBERT B. CAMPBELL
BROWNING ADAMS
PRITCHARD G. ADAMS
WILLIAM H. ADAMS
EDWARD H. ALLEN
FLOSSIE P. ALLEN
JOSEPH A. ALLEN
RACHEL C. ALLRED
HELEN L. ANETIL
LEO I. ANCTIL
RONALD E. ANDERSON
CLARENCE P. ARMSTRONG
CARROLL W. AUSTIN
F. L. AUSTIN, JR.
DONALD P. BAHR
PAUL BALLUS
CHARLES D. BARKER, SR.
WALTER E. BARKHOUSE
EDWARD C. BARRET
JAMES L. BAXTER
RUSSELL W.BEARD
BERNARD L. BEATTY
RICHARD K. BELL
LEO E. BENADE
SHERMAN W. BETTS
JOSEPH H. BETZ
ROBERT L. BLEVINS
FRANKLIN M. BLUNT
TIMOTHY C. BOLICK
MARGARET C. BOONE
HENRY A. BOTKIN

ALEX BOURDAS
OLA MAY (TATE) BOVENDER
EUGENE A. BOWEN
LAVAUNE K. BREDA
MARLOWE G. BREDA
TROND G. BREKKE
LAURA B. BRENDLE
MILLARD BRIDGERS
CLARENCE M. BRIDGES
DORIS K. BRIDGES
CYRUS H. BROOKS, JR.
DANIEL R. BROWN
K.A. BROWN
WILLIAM D. BROWN
BETTY P. BULLOCK
ROBERT S. BULLOCK
FINDLEY BURNS JR.
RAY G. BURRELL
RICHARD E. BUSH
JAMES M. BYRNE
NORMAN L. CARLTON
MATTHEW E. CARMEAN
FRANK CATES
J. CRAWFORD CATON
HARRY E. CHAMBERLAIN
VINCENT H. CHASE
PAUL F. CHAVEZ
WOODROW H. CHILDRESS
JOHN G. CHURCH
HERMAN L. CLANTON
ROBERT L. CLARKE
CHARLES C. CLAUSEN SR.
DENNIS E. CLECKNER
STEVE P. CLEMENIC
LACY W. COATES
RUCIA A. COBB
JAMES A. CODDINGTON
CATHERYN S. COLEY
LAURA K. CONDER
JAMES C. CONINE
MARSHALL G. COOPER
ASBURY COWARD III
NEWTON P. COX
RUTH A. COX
BURNETTE E. CREASMAN
THOMAS J. CULKIN
HAZEL B. CURLEE
MILTON L. DAIL
BEATRICE G. DAVIS
BERNLEY S. DAVIS
DONALD M. DAVIS
ESSIE M. DAVIS
GEORGE E. DAVIS
ROBERT J. DAVIS
CLIFFORD H. DAWSON
CALVIN F. DEAN
ORIEN G. DEAN, JR.
JACK M. DEATON
VIOLET B. DEITMARING
ARLEN J. DEVITO
JOHN E. DEVLYN
SARA E. DEVLYN
JOY E. DICKINSON
MRS. LEROY B. DICKINSON
JAMES E. DIFFEE
DELBERT R. DILLON
MARGARET H. DOPF
RAYMOND E. DOPF
LEROY M. DUFFY
CHARLES F. DUPONT
BOBBY R. EASON
DAVID EDMISTEN
CARL L. EFFLER
JOHN H. ELDER, JR.

JOHN R. ELLIS
MANFORD G. FARR
RITA FESTO
JOHN J. FILAN
ANGELO A. FLORENTINO
ROBERT W. FOLDEN
OSCAR F. FOWLER
MELVIN W. FRITZ
WALTON E. FULCHER
ROBERT C. FULLER
WALTER E. FULLER
FRANK W. FURCHES
NORMAN CARL GADDIS
MARSHALL L. GADDY
THOMAS B. GARDINER
ROBERT F. GEISSLER
WILLIAM E. GENTNER, JR.
THOMAS P. GINN
ROBERT W. GOODMAN
JOHN R. GORDON
BERNICE C. GRANDY, JR.
STEVEN W. GRANDY
ROBERT J. GREEN
MICHAEL R. GREESON
JAMES H. GRIFFIN
THOMAS M. GROOME, JR.
JAMES W. GROSS
ARTHUR S. GUNDERSON
HERT L. HANCOCK, JR.
JAMES M. HARDIN
C. LEE HARRIS
HOWARD W. HARRIS
PAUL H. HARVEY
ROLAND R. HATCHER
HENRY S. HEFFLEY, JR.
CARROLL A. HEFNER
CLARENCE J. HENSLEY, JR.
RICHARD M. HERIOT
DORIS T. HERRING
NOVIS S. HERRING
VIRGINIA R. HILDEBRAND
MOZELLE L. HINSHAW
HERMAN J. HIPPS
RUFUS M. HODGIN
DONALD R. HOFFMAN
CHARLES K. HOFFMEYER
MARY R. HOLLAND
EDGAR P. HOLT
RAY HOMESLEY
NED A. HOOD
ROBERT H. HOOD
STEPHEN W. HOPKINS
CLYDE L. HOWARD, JR.
KEVIN G. HUGHES
HARVEY R. HURST
SAM P. HYATT
JOHN L. IRBY
MATTIE B. IVES
FRANCIS JACOBS
RICHARD L. JARRETT
JACQUELINE M. JENNINGS
WOODROW W. JONES
DONALD L. JORGENSON
KENNETH R. JOSEPH
PATSIE W. JOSEPH
EVERETTE R. KELLER
BERNARD J. KELLEY
WILSON P. KEMP
HOWARD LEE KERR
MARGARET C. KERR
WILLIAM S. KETNER
DAVID L.G. KING
THOMAS M. KING, JR.
EVELYN W. KINNEY

JOHN E. KIRK
PAUL E. KIRKLAND, SR.
RAYMOND B. KLEBER
GEORGE M. KNOBL, JR.
WILLIAM F. KNOPF
MAX V. KREBS
WILLIAM J. KUHN JR.
JAMES M. LANGSTON, JR.
JANE W. LANGSTON
ELMER L. LASHUA
JOHN L. LATHAM
DANIEL M. LAUDERBACK
AUGUST R. LAWRENCE
FREIDA H. LEWIS
NORWOOD P. LEWIS
HENRY G. LILES
DOROTHY J. LILES
WALTER E. LINTHICUM
PHYLLIS V. LIPPARD
GEORGE LOTT
ROBERT P. LUCAS
ALLEN M. MABE
THOMAS S. MACELUCH
WILLIAM F. MARCUSON, JR.
WARNER G. MAUPIN
LYLTON E. MAXWELL
OLIVER A. MAYS
ANDREW G. MAYSE
SAMUEL S. MCCACHREN
ELIZABETH S. MCCASKILL
ELIZABETH G. MCDONALD
CLYDE W. MCKIRK
DONALD D. MCGUIRE
NORMAN H. MCLAUGHLIN
DOY K. MCPHAIL
WILLIAM RAY MEDLIN, JR.
ERNEST E. MILLER
MARGARET H. MILLER
EDGAR N. MILLINGTON
HAROLD J. MITCHENER
EUGENE E. MOODY
DOROTHY C. MOORE
JAMES C. MOORE JR.
LUCIE E. MOORMAN
ROBERT M. MOOSE
JACK B. MORRIS
REGENA E. MORRISON
STANLEY B. MORSE
WOODFORD T. MOSELEY
GEORGE R. MUSE
R.J. NETTLES
THOMAS G. NEWPORT
JOHN E. NITSCHE
ALFRED P. NORWOOD
JOHNNIE M. OCHOA
ELVIN E. OGLESBY
OLIVER G. OJA
RUSSELL E. OLSON
LLOYD A. OSBORNE
PAUL B. OSGOOD
WILLIAM C. PAGE
LEE R. PARAMORE
LEWIS W. PATE
CHARLES R. PATTON
VERNON J. PEEBLES
W.W. PEGUES
MARY E. PENN
JOHN D. PENN
ELLIOTTE T. PERKINS, JR.
WILLIAM H. PERRY JR.
PAUL J. PHILLIPPI
RICHARD L. PHILLIPS
RUBY A. PHILLIPS
FRANK J. PIAZZA, SR.

DALLAS PICKARD, JR.
GEORGE A. PINTER
EDWARD W. PIPER
FREDERICK H. PLESS
R.F. HOKE POLLOCK, JR.
LEWINGTON S. PONDER
ELBERT Y. POOLE
JENNETTE C. POOLE
MARTHA BOYCE POTEAT
EDWIN H. PRICE
CHARLES R. PUGH
DANIEL J. QUESENBERRY
MILTON H. QUINN
LOUISE M. RABBINO
THOMAS M. RAMSEY
JACK G. RAY
MARSHALL G. RAY
HAZEL S. REDMON
GEORGE R. REINHART, III
ANNIE E. RENKEL
MADGE O. REYNOLDS
FRANKLIN E.
RICHARDSON, JR.
ALLEN W. RIGSBY
GEORGE M. ROBERTS
JENNINGS B. ROBINSON
JAMES P. ROTH
PHIFER P. ROTHMAN
HAROLD E. RUBLE
HILDA H. RULTENBERG
DONALD E. RUSSELL
GEORGE W. SABO
LYLE E. SAMSON
ROBERT L. SCHEER
FREDERICK L.
SCHUERMAN, SR.
ROBERT J. SCHULLERY
ELWOOD M. SHAULIS
ROBERT T. SHERIDAN
STANLEY T. SHIPLEY
CHARLES B. SHIVELY
CHARLES A. SHUE, JR.
RUTH M. SHUE
ELSIE N. SIMMONS
FREDERICK E. SIMMONS
MARY B. SIMPSON
MANUEL F. SIVERIO
JOSEPH A. SIZOO
EVELYN S. SMITH
GEORGE B. SMITH
JAMES E. SMITH
JAMES P. SMITH
JOE F. SMITH
PERCY H. SMITH
JOSEPH L. SOMMER
RAY H. SPANGLER
JAMES A. SPRANKLE
WILEY L. STANDIFER, JR.
JAMES W. STARBUCK
GERTRUDE D. STARLING
STACY J. STARLING
HENRY C. STEED, JR.
ROY C. STEELEY
ARTHUR L. STEWART
BURLENA J. STEWART
JOHN R. STEWART, JR.
GEORGE W. STILLWAY
RITA M. STILLWAY
HAROLD E. STONE
CLYDE DALTON STOWE
HARRY H. STRUNK
E.C. STUMPF
THOMAS A. SUMMEY, JR.
ELLIS G. SUMNER

LEO B. SUMNER
MILDRED Y. SUMNER
MARGARET K. SWINK
JAMES E. SYKES
OLIVER B. TALBERT
JAMES D. TERRELL
CLYDE E. THOMAS
EMOGENE M. THOMPSON
FRED L. TRACY
ROCCO H. TROMBELLO
JOHN G. TRUITT JR.
WILLIAM H. TURK
JAMES T. VANCE
FRANCES A. VANDEN
GEORGE W. VANDEN
ETHEL D. VANHORN
EDWARD J. VAUGHN
EDWARD VENKLER
ROY L. VICK, SR.
KERMIT J. VINSON
MYRTLE H. VINSON
WILLIAM E. WALLACE
ROLAND J. WEBER
GRACE F. WEINER
LONA C. WEISNER
LAWRENCE O. WELCH
PAUL B. WELCH, JR.
GEORGE L. WESTERLIND
WILLIAM B. WHITE
T. M. WHITTINGTON, JR.
ROBERT S. WILLIAMS, JR.
WILLIAM C. WILLIAMS
WINTON H. WILLIAMS
HAROLD P. WILLIAMSON
EDNA MAE WILSON
ROBERT GRAVES WILSON, JR.
ERNEST G. WINSTEAD
PETER S. WONDOLOWSKI
ROBERT V. WOOD
MAYNARD B. WOODBURY
EVELYN W. WOODBURY
GEORGE W. WILKINS
JACK R. WORLEY
JOHN T. WORRELL
GEORGE T. WORRELL
GEORGE E. YALE, JR.
WILLIAM P. YARBOROUGH

for themselves individually and as designated class representatives on behalf of a certified class of approximately 100,000 federal military and civilian retirees who have been subject to North Carolina income taxation.

MONTANA *AMICI*

The petitioners in *Sheehy v. Montana*, 820 P.2d 1257 (Mont. 1991), *pet. for cert. pending*, No. 91-1473, include:

EDMUND SHEEHY;
RICHARD G. BRANCH;
MARGARET FLEMING;
GEORGE MCGOVERN;
CHARLES W. VANDIEST
ARNOLD S. WIRTALA;
AND
DONALD ZACK,

for themselves individually and on behalf of all other similarly situated federal military and civilian retirees who have been subject to Montana income taxation.

SOUTH CAROLINA *AMICI*

The petitioners in *Bass v. South Carolina*, 414 S.E.2d 110 (S.C. 1991), *pet. for cert. pending*, No. 91-1697, include:

FRANCIS EDWIN BASS, JR.;
JOHN GILREATH;
WILTON A. HOCKENBERRY;
J. LORING JENKINS;
MILDRED B. JENKINS;
MARVIN L. JONES; AND
CATHERINE L. MOYERS,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 70,000 federal military and civilian retirees who have been subject to South Carolina income taxation.

NEW YORK *AMICI*

The appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990), *aff'd as modified*, 579 N.Y.S.2d (N.Y. App. Div. 1992), *appeal dism'd*, (N.Y., Order, July 7, 1992), include:

EUGENE H. DUFFY
ALICE G. DUFFY;
ETTORE DELZIO;
VIVIAN DELZIO;
ALBERT ENGEL;
JUDITH ENGEL;
STANLEY L. GOLDSTEIN;
MILDRED GOLDSTEIN;
HARVEY GOTTLIEB;
PETER M. KALEY;
MARY T. KALEY;
DANIEL J. MAHER;
MARGARET A. MAHER;
FERNANDO S. MAURA;
THOMAS F. MOLLOY;
JOSEPH A. O'SULLIVAN;
RITA M. O'SULLIVAN;
JAMES SWEEZY;
ALICE SWEEZY;
IRVING WAX; AND
HELEN WAX.

UTAH *AMICI*

The cross-appellants in *Brumley v. Utah State Tax Commission*, No. 91-0242 (Utah, argued Apr. 7, 1992), include:

DRUE ALDOUS;
DERRAL ALLEN;
RICHARD ANDRUS;
DWIGHT BAERTSCH;
DOUG BALDWIN;
COLLEEN BALLOW;
MARGARET BATCHELOR;
KENNETH BELWOOD;
ALLEN BERGESEN;
ROBERT BIGSBEE;
LOUIS BONOMO;
NORMA BONOMO;
VERL BOSWORTH;
BARBARA BOWMAN;
BERM BOWMAN;
MARGARET BUSCHE;
MAY BUTTON;
BLAKE CHARD;
ARTWELL CHECKETTS;
BEATRICE CLAYTON;
SYBIL COLTER;
OLIVE COOMBS;
HAZEL COOPER;
MARILYN CORDON;
LEONARD COTTAM;
JAY CRAGUN;

BUFORD CRAWFORD;
MACK CROFT;
TOM CROSBY;
FERN DAVIS;
GARY DAVIS;
BERT DAYTON;
DON DEBOER;
WALT DEGN;
JOHN DEWEY;
LAMAR DEWEY;
CAROL DONNELLY;
FLORA ECK;
GLEN FERGUS;
ISADORA FETZR;
JETTA FILLIN;
ED FOURNIER;
BARBARA GARVEY;
JOSEPH GRANDUCCI;
LOIS GREEN;
THERON GREEN;
LYNN GROVES;
MARGARET HADLEY;
MARY HASSING;
LEANDER HENRY;
MARY HILLS;
BARBARA HOOPER;
CARLYLE JENSEN;
CHRIS JENSEN;
EVA JENSEN;
HAROLD JOHNSON;
ROBERT JONES;
ULAH JONES;
BYRON JORDAN;
JIM JOST;
RALPH KEITH;
MAX KENNEDY;
DAN KIMOSE;
STEVE KUDLA;
INA LAURITSEN;
MAYE LOEWEN;
JACK LOWERY;
VERNA MARKHAM;
LOLA MCFERSON;
ROY MCFERSON;
NINA MCQUARRIE;
CHARLES MILLER;
GLEN MILLER;
THOMAS MIZE;
EVERETT MOORE;
DONALD MOYER;
LAVONNE NANCE;
THAD NAPPER;
GUY NELSON;
KEITH NICHOLS;
CLYDE OLSON;
LEROY OLSON;
LAVON PALMER;
CARL PEARCE;
AXEL PEDERSEN;
GENE PENHRWOOD;
LEE PENHRWOOD;
RONALD PERCY;
DIETER POEHLER;
KENNETH REED;
KENNETH REED;
SHIRLEY REED;
SHIRLEY REED;
DONALD RENSCH;
KIRBY RICE;
PARIS ROBINSON;
AUBREY RUPEL;
RAD SAYMAN;
JACK SEAMONS;
SIDNEY SHARP;

DANIEL SHORT;
JACK SHURTLIFF;
DAWSON SIMPSON;
VIRGINIA SINGLETON;
HETTY SLY;
JOHN SNELL;
MYRA SNELL;
FRANK THEALL;
BILL THOMAS;
GRACE THORNTON;
MARY TOLLIVER;
GEORGE WAHLEN;
KIRT WALLING;
VINCENT WEST;
LAURA WICKHAM;
DON WILCOX;
GORDON WILLIAMS;
THOMAS WOOLWORTH;
IRENE C. ALLRED;
ARTELL B. ALLSOP;
DON F. ALLSOP;
ROBERT C. AMUNDSON;
KENNETH A. ANDERSON;
HOWARD D. ANDERSON;
ELLA M. ANDERSON;
ALBERT FRANCIS BAHR;
DURAN C. BAILEY;
RUTH E. BAILEY;
RUSSELL H. BALL;
CECIL G. BARGERON;
ROBERT B. BARKER;
H. ARCHIE BARNES, JR.;
LELAND H. BARTON;
FAUN J. BEESLEY;
FAWN J. BEESLEY;
JOHN E. BELL;
VERNON M. BERGSTROM;
JAMES K. BESSO;
RONALD K. BLIVEN;
JULIA E. BOBB;
WILLIAM E. BOEHLEN;
ROBERT H. BRACKEN;
DEAN C. BROWN;
WENDELL E. BRUMLEY
ROBERT S. BURTON;
WM. G. BUTLER;
ANNABEL L. BYRD;
LORNA M. CALL;
DEONE C. CANDLAND;
DAVID M. CANDLAND;
JOHN D. CARR;
R. H. CHANNEL;
GEORGE M. CHAPPLE;
CHARLES L. WALKER;
MARTHA J. CHASTAIN;
DON L. CHILD;
KENNETH A.
CHRISTENSEN;
VERNON A. CHRISTENSEN;
LEWIS K. CLARK;
DOYLE R. CLARK;
JACK S. CLARK;
WANDA B. CLAWSON;
WILLIAM C. CLAWSON;
GARTH M. COLTON;
SPENCER C. CONDIE;
OLIVE S. COONS;
HAZEL D. COOPER;
LEWIS R. COOPER;
LEWIS R. COOPER;
PAUL M. CROSBY;
JOHN L. DAVIS;
LT.COL. DEAN W. THORPE;
NORBERT V. DEBYLE;

ALBERT M. DEGERING;
SYLVESTER L. DIBELLA;
STANLEY L. DRANEY;
ALVIN D. DURRANT;
RAY M. ECK;
ARNOLD T. ELLSWORTH;
HOLLIS T. FRANCOM
HOLLIS T. FRANCOM;
GEORGE B. FRY;
FRANCES C. FUNK;
ROBERT L. GARVEY;
LT. COL. GERALD E. DICKSON;
JOHN W. GILMORE;
LUCILE B. GLADE;
NORMAN J. GRIMSHAW;
WILSON C. GUTZMAN;
ARLAN E. HADLEY;
HARLEY M. HANDY;
DALE N. HANSEN;
EARL E. HANSON;
HAROLD J. HARDY;
JAMES C. HARMAN;
IDA G. HARPOLE;
EMERSON R. HARTZELL;
EDWARD D. HAWKINS;
JACK M. HELGESEN;
LORRAINE P. HELGESEN;
LT. COL. HENRY HILLS;
DONALD J. HILDEBRAND;
LESTER G. HINCHCLIFF;
DELBERT L. HIRSCHI;
FRED A. HODAPP;
ELIZABETH H. HOELLEIN;
FRANCIS P. HOLST;
VIOLET B. HOOKER;
PAUL L. HOWARD;
ELNA M. HUILLET;
ALVIN C. HULL;
PHILLIP K. HUMPHREYS;
BOYD A. IVORY;
HOWARD M. IVORY;
CARL L. JENSEN;
DONALD R. JENSEN;
BESS T. JENSEN;
CHRISTINE T. JENSEN;
HARRY E. JOHNSON;
LUCILE S. JOHNSON;
CHARLEY A. JONES;
SAMUEL E. JORGENSEN;
MARTIN A. KASWORM;
A. GEORGE KATO;
JAMES T. KELLY;
CHARLES R. KING;
GLORIA C. KINNE;
E. WILLIAM KLEV;
JERRY G. KRZEMSKI;
DON R. LANGTON;
DONALD E. LAURITSEN;
LOUISE H. LEAKE;
THOMAS S. LEAKE;
JANE M. LEMMONS;
RICHARD C. LESSEY;
SHIRLEY DAN LOCKHART;
ROBERT E. LUDWIG;
JAMES T. LUHN;
JAMES N. LUND;
DALE A. MARTIN;
WILLIAM C. MARTIN;
ALLAN D. MCCOMB;
PATSY N. MCKELL;
ROBERT H. MCKINLAY;
ALBERT R. MCNAMEE;
COL. N.B. MECRARY;

JOHN W. MENEILL;
WILLIAM R. MILLER;
D. L. MONTGOMERY;
DARRELL L. MONTGOMERY;
CHERRIL H. NELSON;
JANE E. NICHOLS;
JAMES L. NIELSEN;
RUTH M. NIELSEN;
LYLE F. NIELSON;
EDWARD L. NOBLE;
WILLIAM P. NYE;
BOYD G. PARKER;
KARL G. PARKER;
KARL G. PARKER;
IRINTHA S. PARKER;
MICHAEL D. PATRICK;
BOYD W. PAUL;
SYDNEY C. PEACOCK;
ELTON J. PERRY;
RONALD W. PHELPS;
EVAN S. PICKETT;
J. MERLE PRINCE;
CHARLES L. PURVIS;
COL. JAMES R. JENNINGS;
FRANK D. REITER;
LULA CROFT,
representative for J.C. CROFT, deceased;
MARY TOLLIVER,
representative for: RICHARD TOLLIVER, deceased;
MAJ. GEN. REX A. HADLEY;
RODNEY C. RHODES;
ESTATE OF RICHARD M. TOLLIVER;
JOSEPH G. RICHARDSON;
KENNETH J. RIDDELL;
ROBERT G. RIDING;
CHARLES N. ROBERTSON;
COL. JAKE ROGERS;
C. O. ROWE;
EMMA L. RUGGLES;
MAESER M. RUSHTON;
ATHUS DELOSS RUSSELL;
MARGARET F. RUSSELL;
MAJ. JESSE S. WALKER;
MAJ. WM. S. SLEEPER;
JAMES R. SALVAGE;
GERALD D. SANDFORD;
BENJAMIN L. SCHAFER;
FRED L. SEPPI;
WILLIAM H. SEWARD;
WILLAM A. SHEEHAN;
WAYNE E. SHOOP;
DEAN T. SIGMAN;
PAUL A. SIMMONS;
RUTH B. SMITH;
MARY E. SMITH;
RUBY L. SMITH;
T. C. SPRATLEN;
FLEET L. STANTON;
MAXINE E. STEVENS;
NANCY G. STEWART;
HERBERT E. STRAND;
MACK D. SULLIVAN;
JAMES B. SWENSON;
LEIF A. SYVERSEN;
RICHARD P. SYVERSEN;
DONALD D. TAYLOR;
LEWIS D. TAYLOR;
ROBERT G. TAYLOR;
JAMES W. TAYLOR;
LAMAR W. TAYLOR;
T. C. TEASDALE;

MERLIN E. TEBBS;
LENA D. THEALL;
DON E. THOMAS;
ELVA A. THORNTON;
JOHN R. THUNELL;
CARMEN G. TICE;
DOROTHY T. TICE;
GLEN L. VANLEEUWEN;
VERNON E. VOSS;
GLENNA A. WALE;
RICHARD K. WEST;
KENNETH W. WESTERMAN;
EDWARD E. WIGGINS;
ROY E. WILLIAMSON;
MARVIN H. WOODBURY;
JACK L. WOODS;
M. G. WORKMAN;
R. J. YOUNGER;
EARNEST E. ZIMMERMAN;
MARILYN H. ZIMMERMAN,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 34,000 federal military and civilian retirees who have been subject to Utah income taxation.

ALABAMA *AMICI*

The cross-appellees in *Sizemore v. Rinehart*, No. 2900290 (Ala. App. 1992), *pet. for cert. pending* (Ala., No.1911015), include:

EDMON L. RINEHART;
FRED MELOF; AND
CHARLES A. OLTS,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 17,000 federal military retirees who have been subject to Alabama income taxation.

ARIZONA *AMICI*

The appellants in *Bohn v. Waddell*, 790 P.2d 772 (Ariz. T.C. 1990), *aff'd on reconsideration*, 807 P.2d 1 (Ariz. T.C. 1991), *appeal pending*, No. 1 CA-TX 90-029 (Ariz. App., argued Feb. 12, 1991), include:

ESTATE OF JOHN L. BOHN;
SHIRLEY BOHN;
DONALD RUTAN;
MARY RUTAN; AND
CARL LINTON,

for themselves individually and, under the doctrine of virtual representation on behalf of a certified class of approximately 70,000 federal military and civilian retirees who have been subject to Arizona income taxation.

APPENDIX B

The Supremacy Clause of the United States Constitution, Article VI, cl.2 provides:

> This Constitution, and the laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

APPENDIX C

4 U.S.C. § 111 provides in pertinent part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States...by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of pay or compensation.